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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 325

LOUIS A. NEGRE

VS.

STANLEY R. LARSEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Rehearing

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Petitioner Louis A. Negre seeks rehearing because the decision of the court rests upon assertions of fact squarely contrary to the uncontradicted findings of fact in the record in the present case.

The majority opinion in connection with free exercise of religion rests upon a proposition which is simply untrue:

“The conscription laws, applied to such persons [“objectors to particular wars”] as to others, are not designed to interfere with any religious ritual or practice, and *do not work a penalty against any theological position.*” (Emphasis added) Slip opinion page 25.

To the contrary, Negre is denied discharge from the military service solely because he is unwilling to renounce his theological position: To wit, the position that the teaching of the Catholic Church and its Supreme Pontiff is binding upon Negre as a Catholic in matters of faith and morals.

The Army hearing officer fully accepted Negre's statement:

"At present I feel that I could not conceive participation in any war." R. 14.

Indeed, the Army hearing officer expressly found:

"It cannot be doubted that PFC Negre is opposed to killing if he has to be directly involved in it." R. 39.

"... PFC Negre is conscientiously opposed to the use of force if that force has to be asserted by him." R. 40.

Negre thus falls squarely under the test of the majority opinion:

"In the draft area for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint." Slip opinion page 16.

Negre is an objector to "all killing in war". Slip opinion page 23.

Negre is to be denied the privilege of discharge from Army (or by identical reasoning subjected to punishment for disobedience of orders) not because his own belief which is: "At present I feel I could not conceive participation in any war." R. 14. Rather Negre is to be subjected to disability or punishment solely because he will not renounce the truth of the teaching of the Catholic Church, its Fathers, Doctors and Popes, that wars indeed may exist which are just wars in which a Catholic has a duty to participate if duly called by his government.

The majority opinion declares :

“Unwillingness to deny the possibility of a change of mind in some hypothetical future circumstances, may be no more than humble good sense, casting no doubt on the claimant’s present sincerity of belief.” Slip opinion pages 10-11.

Nothing could more precisely describe Negre’s beliefs than the passage just quoted from the majority opinion : Negre’s present sincerity of belief was not denied. Rather the Army hearing officer expressly found :

“His sincerity is shown by his willingness to be incarcerated for his beliefs.” R. 37.

Under the majority opinion however Negre is to be subjected to disability solely because he will not disavow the teaching of his church that under “hypothetical future circumstances” Negre’s participation in war would not be sinful.

The hypothetical future circumstances may never in fact occur and Negre may never find a war in which his religious beliefs will permit him to participate. Cardinal Ottaviani, a Catholic theologian stated “modern wars can never fulfil those conditions which (as we stated earlier on in this essay) govern — theoretically — a just and lawful war.” (Quoted by dissent of Justice Douglas, slip p. 4).

Thus, Negre is subjected to disability or punishment solely for his belief in religious doctrine : To wit the Catholic doctrine on war. St. Thomas Aquinas asks : “Whether It Is Always Sinful to Wage War?” *Summa Theologica* Question 40 First Article. Aquinas answers that it is not always sinful to wage war. *Codex Juris Canonici*, Canon 1366 par. 2 admonishes instructors of the Catholic religion to “follow the Angelic Doctor’s [Aquinas’] method, doctrine and principles and steadfastly adhere to them.”

Under the majority opinion Negre is subjected to disability solely because he will not renounce, disavow and declare to be false the teaching of St. Thomas Aquinas and the other Fathers, Doctors, Saints and Popes who have pronounced the authoritative religious doctrine of the Catholic Church.

The majority opinion asserts that the punishment or disability for religious doctrine involved in its construction of section 6(j) does not intrude upon " 'voluntarism' in religious life . . ." Slip opinion p. 16.

"A claimant, seeking judicial protection for his own conscientious beliefs, would be hard put to argue that § 6(j) encourages membership in putatively 'favored' religious organizations, for the painful dilemma of the sincere conscientious objector arises precisely because he feels himself bound in conscience not to compromise his beliefs or affiliations."

We concede immediately that the devout Catholic is not supposed to surrender his faith though the state threatens him with punishment for holding fast to it. Particularly instructive is the case of Thomas More, former Lord Chancellor of England. In a letter to his daughter describing his interrogation in the Tower, More tells how the Archbishop of Canterbury, cooperating with the government, put it to More:

"you know for a certainty and a thing without doubt that you be bounden to obey your sovereign lord your king. And therefore are ye bounden to leave of the doubt of your unsure conscience in refusing the oath, and take the sure way in obeying of your prince, and swear it."

To this More answered

"that in my conscience this was one of the cases in which I was bounden that I should not obey my prince since that whatsoever other folk thought in the matter

(whose conscience or learning I would not condemn nor take upon me to judge) yet in my conscience the truth seemed on the other side." (More to his daughter, Margaret, April 1534, *The Last Letters of Blessed Thomas More* ed. W.C. Campbell, 1924, pp. 40-41).

Beheaded by the state for his fidelity to conscience, Thomas More has been recognized as a martyr for the Catholic faith and canonized as a saint of the Catholic Church (*Acta apostolicae sedis* XXVII, pp. 202-204).

In the context of refusal of military service obedient to Catholic religious conscience we find the Austrian peasant, Franz Jagerstatter, who was beheaded on August 9, 1943 for refusing to serve in the German army on the ground that he would be participating in an unjust war. In prison Jagerstatter wrote:

"There are probably many Catholics who think they would be suffering and dying for the faith only if they had to suffer punishment for refusing to renounce the Catholic Church. But I believe that everyone who is ready to suffer and die rather than offend God by even the slightest venial sin also suffers for his faith.—I definitely prefer to relinquish my rights under the Third Reich and thus make sure of deserving the rights granted under the Kingdom of God." (Jagerstatter, Statement, quoted in Gordon C. Zahn, *In Solitary Witness: The Life and Death of Franz Jagerstatter* pp. 128-129).

Suffering death because of his conscientious selective objection to Hitler's war, Jagerstatter acted in obedience to his religious convictions as a Catholic.

We thus concede that devout Catholics will not surrender their religious faith because the government of the United States of America under section 6(j) of the Military Selective Service Act subjects them to disability or punishment for holding to their religious doctrine.

What we do not concede is the very odd view of "establishment of religion, or prohibiting the free exercise thereof" espoused by the court at page 16 of the slip opinion that section 6(j) is not an establishment of "putatively 'favored' religious organizations" nor an interference with freedom of religious belief because true Catholic believers ought to and will accept death, literally, rather than surrender their faith in God and his Church.

Have we come so far down the road of judicial relativism that it is not establishment of religion nor interference with the free exercise thereof for Congress to pass a law which exacts punishment of a man who will not disavow his religion? If so the First Amendment has become meaningless, and the Supreme Court has forgotten the great words of Chief Justice Marshall:

"That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.

• • • • •

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it. *Marbury v. Madison*, 1 Cranch 176-177, 2 L.Ed. 60 at 73 (1803).

In stark contrast to the courageous trust of the early court in the constitution, in the present case the majority opinion

disregards the limitations placed by the First Amendment on Congress under the false premise that:

"The conscription laws, applied to [objectors to particular wars] do not work a penalty on any theological position." Slip opinion p. 25.

The premise is false because the conscription laws as interpreted in the present case work a penalty upon the theological position of Negre and any other religious person who by reason of conscience is unable to participate in the present war, but whose religion teaches that in other hypothetical future circumstances it would not be sinful for the member of the religion to participate in another, different, hypothetical war.

As if recognizing that the premise is false, the opinion continues that the burdens upon religious objectors to the particular war in which they are called to serve are justified by

"substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8."

But Congress never passes laws which do not reflect in its view "substantial governmental interests", and the First Amendment like the other amendments in the Bill of Rights was passed expressly to limit the powers conferred on Congress and the government by the prior portions of the constitution including Article I section 8.

CONCLUSION

The majority opinion is inconsistent with the facts in the record. The majority concludes that the conscription laws "do not work a penalty against any theological position." The facts of record to the contrary prove that the conscription laws work a penalty against Negro solely because of his theological position.

For the reasons stated the court should grant rehearing and reverse the judgment below against Negro.

Dated: March 31, 1971.

Respectfully submitted,

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